APPENDIX A

C O P Y

SUPREME COURT
FILED
FEB 8 1981
LAURENCE P. GILL, CLERK

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,	)	
	)	
Petitioner,	)	S.F.24309
	)	
v.	)	
	)	
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,	)	
	)	
Respondent;	)	
	)	
THE PEOPLE,	)	
	)	
Real Party in Interest.	)	
	)	

Maurice Keenan, an indigent defendant charged with a capital offense, seeks a writ of mandate to compel respondent superior court to grant his motion for public funds to pay for the services of a second attorney to assist in the preparation of his defense. He relies on Penal Code section 987.9 as

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SEE DISSENTING OPINION

authority for this request.[1/] For the reasons that follow, we hold that the

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1/ Section 987.9 provides:

"In the trial of a capital case, the indigent defendant, through his counsel, may request the trial court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that such an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

"At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section."

Unless otherwise specified, all statutory references hereinafter are to the Penal Code.

trial court abused its discretion in refusing to order such funds.

Defendant was arraigned in October 1979 and charged with murder and six other felony counts.[2/] Special circumstances were also alleged, thus subjecting him to a possible death sentence. (§ 190.2, subds. (a)(17)(i), (a)(17)(vii).) M. Gerald Schwartzbach was appointed to represent defendant on October 7, 1980.[3/] Schwartzbach had some familiarity with the case as a result of his representation of Linda

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2/ The indictment charged the following seven felonies: count I, murder (§ 187); count II, burglary (§ 459); counts III and V, attempted robbery (§ 644); count IV, robbery (§ 211); count VI, possession of a sawed-off shotgun (§12020); count VII, possession of a gun by a felon (§ 12021).

3/ Defendant had been assigned private counsel at arraignment after the public defender declared a conflict of interest (§ 987.2). Subsequently a conflict arose between defendant and his original counsel; thereupon Mr. Schwartzbach was appointed.

Keenan, who was accused of being an accessory after the fact to the offenses charged against defendant.[4/] Two days after Schwartzbach's appointment, trial was set for November 24, 1980, despite his plea that he could not be ready before January 1, 1981.

Shortly after the trial date was set, defendant made a motion for an in camera hearing that funds be allocated pursuant to section 987.9 to provide expert and investigatory help in the preparation of the defense.[5/] Specifically,

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4/ Defendant and Linda Keenan specifically waived any conflict of interest that might arise as a result of Schwartzbach's joint representation of them. Linda Keenan's trial has since been severed from that of defendant.

5/ Section 987.9 (fn. 1, ante) provides that both the request for such funds and the contents of the application shall remain confidential. Accordingly when we first considered this matter we directed the Court of Appeal to maintain the confidentiality of defendant's request. Defendant has since waived his

funds were requested for a private investigator, a serology expert, psychiatric and neurological testing, and jury selection experts. The court granted $16,000 for these purposes.[6/] Funds were also requested for a second attorney on the ground that the case presented complex factual and legal issues, but this request was denied. Counsel then unsuccessfully sought a continuance of the trial date. A renewed motion for funds for a second attorney was subsequently denied. Defendant seeks a writ of mandate to compel the trial court to allocate such funds.

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right to confidentiality for the limited purpose of conducting oral argument before this court and publication of this opinion. The remainder of the record, however, remains confidential.

6/ Another $7,000 was later granted, making the total allocated for investigation and experts $23,000.

The right to counsel of a person charged with a crime is guaranteed by both the federal and state Constitutions. (U.S. Cont., 6th Amend.; Cal. Const., art. I, § 15.) To meet the constitutional standard the defendant must be provided effective legal assistance in the preparation and trial of the case. (Powell v. Alabama (1932) 287 U.S. 45, 71; McMann v. Richardson (1970) 397 U.S. 759, 771.) If a criminal defendant is unable to employ private counsel the court must appoint an attorney to represent him. (Gideon v. Wainwright (1963) 372 U.S. 335.) The right to effective counsel also includes the right to ancillary services necessary in the preparation of a defense. (In re Ketchel (1968) 68 Cal.2d 397; People v. Faxel (1979) 91 Cal.App.3d 327, 330; Mason v. State of Arizona (9th Cir. 1974) 504 F.2d 1345, 1351.)

In People v. Jackson (1980) 28 Cal.3d 264, we had occasion to consider whether an indigent defendant in a capital case had an absolute statutory or constitutional right to be represented by two appointed attorneys. Defendant in that case relied on section 1095, which provides that "If the offense charged is punishable with death, two counsel on each side may argue the cause. In any other case the court may, in its discretion, restrict the argument to one counsel on each side."

We held in Jackson that section 1095 "does not purport to authorize or mandate the appointment of additional counsel at public expense, but only to permit the argument of the case by two counsel." (28 Cal.3d at pp. 285-286.) We went on to hold there was no merit to the claim that equal protection principles compelled appointment of a second

attorney for an indigent defendant in a capital case simply because an affluent defendant exercising his right under section 1095 was entitled to have two attorneys argue his case. We reasoned that precise equality is not required, and concluded that "equal protection demands are satisfied by permitting the trial court, in its discretion, to appoint additional counsel at public expense if the circumstances in a particular case appear to require such an appointment." (Id. at p. 287.)[7/] As authority for the

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7/ The Ninth Circuit reached a similar conclusion in Mason v. Arizona (9th Cir. 1974) supra, 504 F.2d 1345. In Mason the defendant was represented by appointed counsel after the public defender's office declared a conflict of interest. The defendant requested funds for a private investigator, arguing that he would have had access to one had he been represented by the public defender. The court held that equal protection standards were met because the trial court had discretionary power to appoint an investigator. The court stressed that

trial court to exercise this discretion, we cited section 987.9. As we have seen, under the terms of that section the defense may make a confidential application for funds for investigators, experts and others reasonably necessary for the preparation of the defense of an indigent defendant in a capital case. The judge must rule on the reasonableness of the request, using as his criterion "the need to provide a complete and full defense for the defendant." (Fn. 1, ante.)

In Jackson we refused to find that the trial court had abused its discretion in this regard. Noting that the defendant had failed to present any specific, compelling reasons for appointment of a second attorney, we concluded

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the public defender's office operated under a restricted budget and thus also was forced to make choices about how to allocate resources.

that "neither the facts nor the legal issues . . . appear[ed] to have been so complex as to require the assistance of additional counsel as a matter of law." (28 Cal.3d at p. 288.) Nevertheless, Jackson stands for the proposition that in appropriate circumstances an indigent defendant in a capital case should have a second court-appointed attorney. The appointment is not an absolute right, however, and the decision as to whether funds will be allocated for this purpose remains within the sound discretion of the trial court.

That discretion, of course, must be "guided by legal principles and policies appropriate to the particular matter at issue." (People v. Russel (1968) 69 Cal.2d 187, 195; Bullis v. Security Pac. Nat. Bank (1978) 21 Cal.3d 801, 815.) In deciding a motion under section 987.9 the court is in every instance dealing with

a case in which the death penalty may be imposed. The United States Supreme Court has expressly recognized that death is a different kind of punishment from any other, both in terms of severity and finality. Because life is at stake, courts must be particularly sensitive to insure that every safeguard designed to guarantee defendant a full defense be observed. (Gardner v. Florida (1977) 430 U.S. 349, 357; Gregg v. Georgia (1976) 428 U.S. 153, 187.) Thus, in striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime. (United States v. See (9th Cir. 1974) 505 F.2d 845, 853, fn. 13; Powell v. Alabama, supra, 287 U.S. at p. 71.)

The Legislature has also recognized that a defendant in a capital case may

need certain protections not granted to one charged with an offense carrying a lesser penalty.[8/] Section 987.9 demonstrates this concern by its broad language authorizing funds for "the preparation or presentation of the defense" and its direction that in ruling on a defendant's request the court must be guided by "the need to provide a complete and

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8/ Examples of the Legislature's different treatment of capital cases include sections 1095, 1070, and 1018. Section 1095, as discussed earlier, permits argument by two counsel for both sides in a capital case. Section 1070 allows 26 peremptory challenges by the defense or prosecution in a case in which the defendant faces the death penalty or life imprisonment, while fewer challenges are allowed for less serious offenses. Section 1018 prohibits a plea of guilty when the death penalty may be imposed unless defense counsel has agreed to the plea. In applying section 1018, we noted the Legislature's "careful distinction between capital and noncapital cases" and emphasized that the statute was intended as a "further independent safeguard against erroneous imposition of a death sentence." (People v. Chadd (1981) 28 Cal.3d 739, 747, 750.)

full defense.[9/]

Another factor the trial court must weigh in exercising its discretion is the importance this court has attached to pretrial preparation in providing a criminal defendant effective legal assistance. Part of counsel's responsibility to a client is to become thoroughly familiar with the factual and legal circumstances of the case prior to trial. (People v. Frierson (1979) 25 Cal.3d 142, 163; People v. Pope (1979) 23 Cal.3d 412, 424-425; see also 1 ABA Standards for Crim. Justice (2d ed. 1980) The Defense Function, pp. 4-42.) "Representation of an accused murderer is a mammoth responsibility." (In re

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9/ Similar services may be provided to a noncapital defendant pursuant to section 987.2, which allows appointed counsel reimbursement of necessary expenses. (Puett v. Superior Court (1979) 96 Cal.App.3d 936, 939; People v. Faxel, supra, 91 Cal.App.3d 327, 330.)

Hall (1981) ___Cal. 3d ___, ___.) In a murder prosecution that is factually and legally complex, the task of effectively preparing for trial places a substantial burden on defense attorney. This is particularly true of a capital case, since the possibility of a death penalty raises additional factual and legal issues. This burden may be lightened by employment of investigators and experts, but the ultimate responsibility for coordinating the investigation and assimilating the results must remain with an attorney sensitive to the potential legal issues involved. Because many of the tasks involved in preparation for trial cannot be delegated to nonattorneys, the court cannot assume that authorization of funds for an investigator makes appointment of a second attorney unnecessary. Rather, in assessing the need for another attorney the court must focus on the complexity

of the issues involved, keeping in mind the critical role that pretrial preparation may play in the eventual outcome of the prosecution.

In the instant case, defendant presented the trial court with specific facts and arguments of the type we found lacking in Jackson, to support his motion for a second attorney. The declarations accompanying the motion stressed the factual and legal complexity of the case. Counsel stated that it would be necessary to interview approximately 120 witnesses in order to develop and prepare potentially meritorious defenses, and that he anticipated extensive scientific and psychiatric testimony would be produced at trial, all of which would require extraordinary preparation by him. In addition, defendant was charged in five other criminal cases pending before the superior court, and

counsel had been informed that the prosecution intended to offer at some phase of the trial evidence related to all those cases.[10/] Counsel pointed out that this would necessitate his familiarity with the facts and legal issues involved in those charges as well as the immediate homicide case.

The difficulty of preparation was compounded, counsel argued, by the inherent problem present in any capital case of simultaneous preparation for a guilt and a penalty phase of the trial. He noted that the issues and evidence to be developed in order to support mitigation of the possible death sentence were substantially different from those likely to be considered during the guilt phase.

10/ Subsequent to the in camera hearing counsel discovered four more criminal incidents evidence of which may be introduced at trial.

Counsel acknowledged that some of this task would be undertaken by trained investigators, but contended that supervision and assimilation of the investigative results were of necessity a responsibility for an attorney to perform.

Counsel also informed the court that he intended to make numerous pretrial motions as part of the defense effort and anticipated that review of some of these motions might be necessary. He asserted that only the assistance of another qualified attorney would be usefull in preparation and argument of these motions.[11/]

Counsel's final contention was that his request for funds for a second

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11/ After the motion for a second attorney was denied, counsel made two additional pretrial motions in the trial court and sought review when both motions failed.

attorney should have been considered in light of the early date set for trial. As we have seen, trial was set to begin eight weeks after counsel's appointment despite his protest that he could not adequately prepare the defense in that time.

In denying the motion the court did not question the factual assertions made by defendant but declared instead that a criminal attorney, working alone, should be capable of adequately defending a capital case and that Schwartzbach could "ably and competently perform that task." The court also stated that Schwartzbach had ample time to become familiar with the issues in the case as a result of his earlier involvement as counsel for Linda Keenan and thus had no need for another attorney to aid in trial preparation.

These reasons are inadequate as a matter of law to justify denial of

defendant's motion. The demands of preparing for a murder case when the defendant faces the death penalty cannot be compared to the much more limited task of defending against a charge of being an accessory after the fact. While it is true that Schwartzbach may have required some knowledge of the general facts and issues involved in this case, it is unreasonable to expect that he could have performed the careful pretrial investigation and preparation we have deemed essential to the representation of a capital defendant. Because the crime with which Linda Keenan was charged involved circumstances occurring only after the actual homicide, it was unlikely that counsel could necessarily be familiar with the specific factual or legal defenses available to this defendant. Furthermore, counsel was faced with the necessity of investigating the

other crimes with which defendant had been charged, as well as preparing for the penalty phase of the trial. These tasks were different both in nature and scope from the matters involved in the defense of Linda Keenan.

As indicated above, the court declared that a criminal attorney should be capable of defending a capital case without the assistance of a second lawyer. But this view fails to take into account the showing made by Schwartzbach of the reasons why a second attorney is justified under the facts of this particular case, e.g., the complexity of the issues, the other criminal acts alleged, the large number of witnesses, the complicated scientific and psychiatric testimony, and the extensive pretrial motions, as to some of which review would be sought in the event of adverse

rulings.[12/] The very purpose of section 987.9 is to provide the defendant additional assistance in a capital case when the circumstances warrant it; thus the court abused its discretion in failing to address the specific reasons advanced by Schwartzbach in support of the motion.

Moreover, the section provides that the court shall be guided by the need of the defendant for a "complete and full" defense. This language suggests that the Legislature intended that the court make a careful inquiry as to the need for additional assistance and that it

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12/ The People denigrate defendant's problem by declaring that the practice of the prosecutor in San Francisco is to have only one attorney handle the case. That point overlooks the large staff of attorneys for the People readily available both for trial assistance and for the review process after denial of pretrial motions; defendant must pursue such review while preparing for trial, whereas the prosecutor has the assistance of the Attorney General's office for this purpose.

apply a higher standard than bare adequacy to a defendant's request for assistance. If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorably on the request. Indeed, in general, under a showing of genuine need, and certainly in circumstances as pervasive as those offered by the attorney in this case, a presumption arises that a second attorney is required. The trial court should have found that the presumption was not rebutted here.

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Let a peremptory writ of mandate issue directing respondent court to allocate reasonable funds to pay for a second attorney.

MOSK, J.

WE CONCUR:

BIRD, C.J.
NEWMAN, J.
KAUS, J.
BROUSSARD, J.
*TOBRINER, J.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

COPY

KEENAN v. SUPERIOR COURT

S.F. 24309

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent. In my view, the trial court did not abuse its broad discretion in denying petitioner the services of a second court-appointed attorney at public expense.

In People v. Jackson (1980) 28 Cal.3d 264, 287, we explained that the trial court in a capital case has discretion to "appoint additional counsel at public expense if the circumstances in a particular case appear to require such an appointment." We indicated, however, that the defendant is required to make a "'substantial showing' that, among other things, 'the cause of justice will thereby be served.' [Citations.]" (Ibid.) Finally, in upholding the trial court's denial of

additional counsel in Jackson, we noted that "the trial court had full opportunity to observe counsel in the course of extensive argument on pretrial matters prior to its ruling . . . and accordingly was well positioned to evaluate counsel's ability." (Pp. 287-288.)

The majority now discards Jackson's requirement that defendant make a "substantial showing" of his need for a second attorney, substituting in its place a "presumption" of such need arising whenever a "genuine need" is established. (Ante, p. __ [maj. opn., at p. 13].) No authorities are cited to support the majority's creation of such a presumption.

In the present case, as in Jackson, the trial court had an ample opportunity for determining that a second court-appointed attorney was unnecessary to

assure petitioner a full and complete defense. Justice Rouse in his opinion for the Court of Appeal in this case observed, "we have thoroughly reviewed the sealed documents and transcripts bearing upon petitioner's request for the employment of a second attorney at public expense, and we have also conducted our own in camera hearing. Defendant does not contend, nor was there any indication to us, that counsel presently assigned to the case is not fully qualified and capable of conducting a fair and adequate defense to the charges, both in the substantive, and, if necessary, the penalty, phase of trial. Many of the tasks for which defendant seeks help from an additional lawyer involve pretrial preparation and are essentially investigative in nature. These, we submit, can be more appropriately carried out by qualified

investigative personnel and other experts acting under the direction and supervision of assigned counsel. Funds have already been provided to defense counsel for this purpose. It is our determination that respondent superior court did not abuse its discretion in denying petitioner's request for funds for the employment of a second attorney and that said court's order of denial was entirely proper and must be upheld."

I fully concur in Justice Rouse's careful analysis. In addition to the services of his present competent counsel, I further observe that, following the in camera hearing in November 1980, the trial court granted petitioner's request for a criminalist, an investigator, a jury selection service, and psychiatric, psychological and neurological testing, and I have no reason to believe that the trial court would deny

additional funds for other services if they prove necessary to petitioner's defense. The trial court can be trusted to continue its sensitive watch over these proceedings. If under Jackson, the court becomes convinced that a second counsel is needed one can be appointed. Our intervention is not required.

In addition to my disagreement with the majority's reasoning, I disagree with its result as well. The majority unconditionally directs the trial court "to allocate reasonable funds to pay for a second attorney" (ante, p. __ [maj. opn., at p. 13]). At best it should remand the cause for reconsideration of petitioner's motion in light of the majority opinion. The record discloses that more than a year has passed since petitioner's motion was first denied. Surely, some trial preparation must have

been completed during the course of a year. Petitioner may no longer require the services of a second attorney. The hearings previously conducted should be renewed to ascertain petitioner's present need for additional legal assistance, pursuant to the wholly new guidelines which are now judicially created by the majority.

Because I conclude that defendant is being fairly and generously treated by the trial court system, I would sustain its action and deny the peremptory writ.

RICHARDSON, J.

KEENAN v. SUPERIOR COURT

S.F. 24309

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C O P Y

SUPREME COURT
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LAURENCE P. GILL, CLERK

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

MAURICE JOHN KEENAN,	)	
	)	
Petitioner,	)	S.F.24309
	)	
v.	)	
	)	
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,	)	
	)	
Respondent.	)	

MODIFICATION OF OPINION

BY THE COURT:

The above-entitled opinion, appearing at 30 Cal.3d 750, is hereby modified in the following respects:

1. Change the last sentence of the first paragraph on p. 752 to read: For the reasons that follow, we hold that the trial court abused its discretion in denying appointment of additional counsel but that the appointment should be

made under section 987, subdivision (b), and that section 987.9's provisions for confidentiality are applicable by analogy to such motions.

2. Change the second sentence of footnote 5 on page 753 to read: Accordingly when we first considered this matter we directed the Court of Appeal to maintain the confidentiality of defendant's request and determined that the People should not be a real party in interest.

3. Delete the last three sentences of the second full paragraph on page 754 (commencing, "As authority . . . .").

4. Delete the last sentence of the paragraph that overlaps pages 754 and 755, and insert the following text:

As authority for the trial court to exercise this discretion, Jackson cited section 987.9. As we have seen, under the terms of that section the defense may

make a confidential application for funds for "investigators, experts and others" reasonably necessary for the preparation of the defense of an indigent defendant in a capital case. The section does not expressly refer to appointment of an additional attorney, though its applicability for that purpose was assumed in Jackson. Here, however, the Attorney General, appearing as amicus curiae, contests that applicability, pointing out that funds to implement section 987.9 must be wholly provided by the state (Rev. & Tex Code, §§ 2207, 2231), whereas the state reimburses counties for no more than 10 percent of the cost of appointed counsel (§ 987.6).

The wording of section 987.9, together with its legislative history, lead us to conclude that it was intended to supplement pre-existing provisions

for employment of defense counsel at public expense by making provision for services ancillary to those of counsel.[8/]

Section 987, subdivision (b), provides that "[i]n a capital case, . . . [i]f the defendant is unable to employ counsel, the court shall assign counsel to defend him." That section, together

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8/ Section 987.9 was enacted as chapter 1048 of the 1977 Statutes. The Legislative Counsel's digest of the chapter states: "Existing law provides for the assignment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel. [¶] This bill would provide for payment of investigators, experts, and others for the preparation or presentation of the defense of indigent defendants in capital cases. [¶] The bill would appropriate $1,000,000 from the General Fund to the State Controller for allocation and disbursement to local agencies. [¶] This bill would take effect immediately as an urgency statute, but would be operative only if SB 155 is chaptered."

Senate Bill 155, referred to in chapter 1048, was enacted at the same legislative session and became chapter 316, providing for the death penalty (former §§ 190-190.5; § 190.6).

with other provisions for court-appointed counsel (see §§ 987.2-987.8), provides ample authority for appointment of an additional attorney shown to be necessary for defense of a capital case. To avoid undue disclosure of defense strategy, defendant is entitled to the application, by analogy, of section 987.9's provisions for confidentiality to the making and hearing of the motion for such appointment. (See Puett v. Superior Court (1979) 96 Cal.App.3d 936, 940, fn. 2; People v. Faxel (1979) 91 Cal.App.3d 327, 330, fn. 1.) The appointment is not an absolute right, however, and the decision as to whether an additional attorney should be appointed remains within the sound discretion of the trial court.

5. Renumber footnotes 8, 9, 10, 11, and 12 as footnotes 9, 10, 11, 12, and 13 respectively.

6. Delete the second sentence of the full paragraph on page 755.

7. Change the last sentence of the second full paragraph on page 758 to read: Thus the court abused its discretion in failing to address the specific reasons advanced by Schwartzbach in support of the motion.

8. Delete the first two sentences of the paragraph overlapping pages 758 and 759 and in their place insert the following text:

Moreover, section 987.9, though not providing for appointment of counsel, reflects a legislative intent that the court be guided by a capital defendant's need for a "complete and full defense." That intent, together with the constitutionally mandated distinction between death and other penalties, requires that the trial court apply a higher standard

than bare adequacy to a defendant's request for additional counsel.

9. Delete the last sentence of the opinion, on page 759, and in its place insert the following text:

Let a peremptory writ of mandate issue directing respondent court to appoint a second attorney for defendant.

C O P Y

KEENAN v. SUPERIOR COURT

S.F. 24309

MODIFICATION OF DISSENTING OPINION

By reason of modification of the majority opinion herein, the dissenting opinion, appearing at 30 Cal.3d 759, is modified by striking from page 760 the second sentence of the last paragraph on that page and substituting the following:

The majority unconditionally directs the trial court "to appoint a second attorney for defendant" (ante, p. 759).

RICHARDSON, J.

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN, Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent.	)	S.F.24309

The Attorney General's petition for rehearing is stricken as such but has been considered as if it were an amicus curiae brief suggesting a rehearing on the court's own motion. Rehearing is DENIED.

Richardson, J., is of the opinion that the petition should be granted.

APPENDIX C

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, of the press; . . . .

AMENDMENT XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

CALIFORNIA PENAL CODE

§ 987. Advising defendant on arraignment of right to counsel; assignment of counsel; financial statement

(a) In order to assist the court in determining whether a defendant is able to employ counsel in any case, the court may require a defendant to file a financial statement under penalty of perjury. The financial statement shall be confidential and privileged and shall not be admissible in evidence in any criminal proceeding except the prosecution of an alleged offense of perjury based upon false material contained in the financial statement. The financial statement shall be made available to the prosecution only for purposes of investigation of an alleged offense of perjury based upon false material contained in the

financial statement at the conclusion of the proceedings for which such financial statement was required to be submitted. The financial statement shall not be confidential and privileged in a proceeding under Section 987.8.

(b) In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him.

(c) In a capital case, if the defendant appears for arraignment without counsel, the court shall inform him that he must be represented by counsel at all stages of the preliminary and trial proceedings and that such representation will be at his expense if he is able to employ counsel or at public expense if he is unable to employ counsel, inquire of him whether he is able to employ counsel and, if so, whether he desires to employ counsel of his choice or to have counsel assigned to him, and allow him a reasonable time to send for his chosen or assigned counsel. If the defendant is unable to employ counsel, the court shall assign counsel to defend him. If the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to him.

§ 987.1 Counsel at preliminary examination; continuity in representation

Counsel at the preliminary examination shall continue to represent a defendant who has been ordered to stand trial until the date set for his arraignment in superior court unless relieved by the court upon the substitution of other counsel or for cause.

§ 987.2 Assigned counsel; compensation public defenders; fees chargeable to department of corrections

(a) In any case in which a person, including a person who is a minor, desires but is unable to employ counsel and in which counsel is assigned in the superior court, municipal court, or justice court to represent such a person in a criminal trial, proceeding or appeal, such counsel, in a county or city and county in which there is no public defender, or in a case in which the court finds that because of conflict of interest or other reasons the public defender has properly refused to represent the person accused, shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county.

(b) The sum provided for in subdivision (a) may be determined by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the

total amount of compensation and expenses to be paid, which shall be within the amount of funds allocated by the board of supervisors for the cost of assigned counsel in such cases.

(c) The board of supervisors may by contract provide that any public defender duly appointed or elected may charge reasonable fees to the Department of Corrections for representing inmates of prisons under its control, and the Department of Corrections may upon approval by the court pay such fees into the county treasury to be placed in the general fund of the county.

(d) Counsel shall be appointed to represent, in the municipal or justice court, a person who desires but is unable to employ counsel, when it appears that such appointment is necessary to provide an adequate and effective defense for defendant.

§ 987.3 Court-appointed counsel; compensation and expenses; criteria

Whenever in this code a court-appointed attorney is entitled to reasonable compensation and necessary expenses, the judge of the court shall consider the following factors, no one of which alone shall be controlling:

(a) Customary fee in the community for similar services rendered by privately retained counsel to a nonindigent client.

(b) The time and labor required to be spent by the attorney.

(c) The difficulty of the defense.

(d) The novelty or uncertainty of the law upon which the decision depended.

(e) The degree of professional ability, skill, and experience called for and exercised in the performance of the services.

(f) The professional character, qualification, and standing of the attorney.

§ 987.4 Reimbursement by parent or guardian for services of public defender or assigned counsel in representing a minor

When the public defender or an assigned counsel represents a person who is a minor in a criminal proceedings, at the expense of a county, the court may order the parent or guardian of such minor to reimburse the county for all or any part of such expense, if it determines that the parent or guardian has the ability to pay such expense.

§ 987.6 State payments to counties for providing counsel for persons unable to afford counsel

(a) From any state moneys made available to it for such purpose, the Department of Finance shall, pursuant to this section, pay to the counties an amount not to exceed 10 percent of the amounts actually expended by the counties in providing counsel in accordance with the law whether by public defender, assigned counsel, or both, for persons charged with violations of state criminal law or

involuntarily detained under the Lanterman-Petris-Short Act, Division 5 (commencing with Section 5000) of the Welfare and Institutions Code, who desire, but are unable to afford, counsel.

(b) Application for payment shall be made in such manner and at such times as prescribed by the Department of Finance and the department may adopt rules necessary or appropriate to carry out the purposes of this section.

§ 987.8 Ability of defendant to pay cost of legal assistance; determination by court; notice; order; execution; petition to modify or vacate

(a) In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided. At a hearing, the defendant shall be entitled to have, but shall not be limited to, the opportunity to be heard in person, to present witnesses and other documentary evidence,

and to confront and cross-examine adverse witnesses; disclosure of the evidence against the defendant, and a written statement of the findings of the court. If the court determines that the defendant has the present ability to pay all or part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order to pay all or part of the costs shall not be enforced by contempt.

(b) Prior to the furnishing of counsel or legal assistance by the court, the court shall give notice to the defendant that upon the conclusion of the criminal proceedings in the trial court, the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has such present ability, the court shall order him to pay all or part of such cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action and shall be subject to execution.

(c) Definitions

(1) The term "legal assistance provided" means legal counsel and supportive services including, but not limited to, medical and psychiatric examinations,

invetigative services, expert testimony and any other form of services provided to assist the defendant in the preparation and presentation of the defendant's case.

(2) The term "ability to pay" means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided, and shall include, but not be limited to the defendant's:

(i) Present financial position;

(ii) Reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purpose of determining reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the cost of his defense.

(iii) Likelihood that the defendant shall be able to obtain employment within a six month period from the date of the hearing.

(iv) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided.

(d) At any time during the pendency of the judgment rendered according to the terms of this section, a defendant

against whom a judgment has been rendered may petition the rendering court to modify or vacate its previous judgment on the grounds of a change in circumstances with regard to the defendant's ability to pay the judgment. The court shall advise the defendant of this right at the time of rendering the judgment.

§ 987.9 Investigators, experts and others; payment for defense of indigent defendant in capital cases; application

In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for such funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation and presentation of the defense. The fact that such an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of such application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making such a ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

APPENDIX D

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No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

SUPREME COURT
FILED
FEB 23 1982
LAURENCE P. GILL, Clerk
Deputy

FEB 23 P.3:04

PETITION FOR REHEARING

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No. 24309

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAURICE JOHN KEENAN, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, Respondent, THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	)

PETITION FOR REHEARING

TO: THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

According to the Opinion of the Court in this case filed February 8, 1982, on at least five separate prior occasions the applications of petitioner, Maurice John Keenan, to have court-appointed co-counsel have been heard and considered by courts of this State. The People, plaintiff in the proceedings below and real party in interest in this action, having yet to be heard, file this Petition for Rehearing pursuant to Rule 27 of the California Rules of Court, and contend as follows:

ARGUMENT

I

AS CONSTRUED BY THIS COURT PENAL CODE SECTION 987.9 VIOLATES THE PEOPLE'S RIGHTS TO DUE PROCESS OF LAW AND FREEDOM OF SPEECH.

The facts of this case as revealed by this Court's opinion indicate that Maurice Keenan, a capitally charged defendant, made a confidential application for funds to pay for investigators and experts as permitted by Penal Code section 987.9. In conjunction with these requests, he further sought funds to pay for a second attorney. The People were given no notice of Keenan's applications. Keenan was given a total of $23,000 to pay for experts and investigators, but his request for funds to pay a second attorney was denied by respondent superior court. Keenan made two more requests for funds for co-counsel, which were again denied. The People again received no notice of the requests or their denials.

Keenan pursued his request for funds to pay co-counsel by filing a secret writ seeking pretrial review of the superior court's denials before the Court of Appeal. No service of this petition was effected upon the People. The Court of Appeal covertly denied Keenan's application for extraordinary relief, issuing a written opinion authored by Justice Rouse. Neither the written opinion nor the votes of the two associate justices on the Court of Appeal has been made public. Finally, Keenan sought hearing in

this Court. Again, there was no notice of Keenan's petition served upon the People. Hearing was clandestinely granted in this Court without notification to the People. At some point, the San Francisco City Attorney was appointed to represent the respondent superior court. The People, as real party in interest, were precluded from filing a brief owing to the absence of notification that the matter was pending.[1/] Oral argument was scheduled for Noverber 30, 1981. Again, no notice was sent to the People. Oral argument was then heard in public session. On February 8, 1982, this Court issued its opinion granting Keenan a second court-appointed attorney. Except for the opinion of this Court, the record of these proceedings has been sealed from public view.

In short, petitioner has been granted funds for the appointment of co-counsel to assist in his defense, based on secret applications which were heard clandestinely by the courts in in camera proceedings, without affording the People notice or opportunity to be heard on the motions. In the absence of any meaningful opportunity to hear from the People, this Court has created a rule of statewide

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1/ These were not the first occasions on which Keenan and his attorney have attempted to preclude representation by the People's elected officials. In People v. Keenan, 1/Crim. No. 20868, presently pending before Division Four of the First Appellate District, Keenan moved on March 6, 1981, to have the Attorney General recused from prosecuting his appeal. The court denied this motion on April 10, 1981, after receipt of Opposition from the People.

impact on the assignment of counsel in death penalty cases. The People, as real party in interest, submit these proceedings were violative of their right to due process of law.

The cornerstone of the Anglo-American system of justice is the adversary system. The United States Constitution recognizes this system as the proper method for resolving questions pertaining to the guilt or innocence of an accused criminal defendant. United States v. Singer (1965) 380 U.S. 24, 36. This system benefits the courts by allowing opposing positions to be heard. In this case the adversary system has been by-passed in favor of unilateral, one-sided representation by one party.

The Government, as a party litigant to criminal proceedings, is entitled to due process of law. For "justice, though due to the accused is due to the accuser also. The concept of fairness must be be strained till it is narrowed to a filament. We are to keep the balance true." Snyder v. Massachusetts (1933) 291 U.S. 97, 122. Society has a right to a fair trial to redress wrongs against it, and "[t]he people of a State are also entitled to due process of law." Stein v. New York (1952) 346 U.S. 156, 196-197; see Fay v. New York (1946) 332 U.S. 261, 288-289; Sun Company of San Bernardino v. Superior Court (1973) 29 Cal.App.3d 815, 822.

The two basic requisites of procedural due process are notice and an opportunity to be heard. Fuentes

v. Shevin (1972) 407 U.S. 67, 80; Lambert v. California (1957) 355 U.S. 225, 228. "This right to be heard has little meaning or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 314.

Here, the People have received neither notice of petitioner's repeated requests for funds to employ co-counsel, nor have they been given an opportunity to be heard on petitioner's applications. Yet, the People of this State unquestionably have an interest in seeing that all criminal defendants receive adequate representation by court-appointed counsel. The costs to society of failing to afford a criminal defendant a fair trial because of inadequate representation by counsel are indeed high. Reversals of criminal convictions inevitably mean the delay of justice both for society and the accused. Victims of crime are often required to relive again painful memories through the medium of cross-examination at retrials. Reprosecution of some cases becomes impossible when witnesses or evidence disappear, and in other cases reprosecution is more difficult because old evidence must be unearthed. See Nebraska Press Asso. v. Stuart (1976) 427 U.S. 539, 555. The People, therefore, are directly affected by the criminal justice system's mistakes when defense counsel is found to have rendered ineffective legal assistance to a criminally accused defendant. It is in this sense that

the People's interests lie in the courts being given accurate information on which they base their decisions and assuring that court-appointed counsel are competent to represent accused criminal defendants adequately.

But, under this Court's ruling appointments of counsel can now be accomplished under a shroud of secrecy. No one would even know that funds had been appropriated to employ co-counsel because the request for such funds would be deemed confidential. We would not even know whether the person selected as co-counsel was a member of the State Bar. The assignment of counsel in death penalty cases is, we submit, too important to permit one-sided applications to be heard behind closed doors, with no opportunity for a response and absent any public accountability for either the superior court's decision to appropriate funds or defense counsel's selection of co-counsel. We cannot believe that the Legislature could have possibly intended this unprecedented result when it enacted Penal Code section 987.9.

Almost a century ago this Court declared in a case involving suppression of public information about a court proceeding:

> "In this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility

of wrong and denying the right to discuss its conduct of public affairs, is opposed to the genius of our institutions in which the sovereign will of the people is the paramount idea; and the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency are regarded as essential to the public welfare. Therefore, when it is claimed that this right has in any manner been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the law-making power, or the right to exercise the authority claimed must be necessarily implied as essential to the execution of the powers expressly conferred."

In re Shortridge (1893) 99 Cal. 526, 530-531.

More recently, this Court observed our Legislature's policy regarding secrecy in government. "The Legislature has said, 'It is the policy of the State of California that public records and documents be open for public inspection in order to prevent secrecy in governmental affairs. . . .'" Bruce v. Gregory, supra, 65 Cal.2d at 677. "Access to and inspection of public records is a fundamental right of citizenship, existing at common law. [Citations

omitted.] It can be abridged or circumscribed only for the most compelling public purpose, and then only by an officer or agency acting pursuant to express authority." (Id. at 679; Mosk, J. dissenting). As Justice Frankfurter stated in his concurring opinion in Joint Anti-Fascist Refugee Com. v. McGrath (1951) 341 U.S. 123-171: "Secrecy is not congenial to truth seeking and self-righteousness gives too slender an assurance of rightness." "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . ." Fuentes v. Shevin, supra, 407 U.S. at 81.

We see no reason in this case (and this Court's opinion provides none) for hiding the fact of co-counsel's requested appointment.[2/] Under the most extravagant reading of the holdings in Allen v. Superior Court (1976) 18 Cal.3d 520, and Prudhomme v. Superior Court (1970) 2 Cal.3d 320, there exists no basis for concluding that knowing of a defendant's request for appointment of co-counsel would in any way violate the defendant's privilege against self-incrimination. The prosecution's burden of proof could not possibly be lightened because it knew that funds for more than one attorney was being requested by the defense. A lawyer, after all, is not like a defense witness, defense expert, or defense investigator. The lawyer's presence will

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2/ As will be demonstrated in Argument II, Penal Code section 987.9 provides no authorization for keeping this fact a secret.

be there for all to see. Unless we accept the notion that the element of surprise at trial, when two defense attorneys suddenly appear at counsel table, is a legitimate tool of a criminal defendant, we see no ground for keeping secret the fact of counsel's request for the appointment of co-counsel.

Allowing for notice and the opportunity to be heard would, on the other hand, forestall any possible accusations of partiality, favoritism or abuse of judicial power. And perhaps most importantly, public disclosure of the request would avoid any appearance of impropriety. Cf. People v. Superior Court (Greer) (1979) 19 Cal.3d 255, 267-268. It is the very secrecy of this proceeding, as contrasted with the court's business generally being conducted in public, which raises the question of propriety. See In re Oliver (1948) 333 U.S. 257, 273. The public's right to honest and impartial government (County of Nevada v. MacMillen (1974) 11 Cal.3d 662, 672) is, we submit, seriously compromised by the secret appointment of counsel now permitted under this Court's ruling.

Moreover, the delicacy surrounding a court's receipt of ex parte communications is reflected by this State's Code of Judicial Conduct. Canon 3(A)(4) provides in pertinent part that "except as authorized by law, [a judge should] neither initiate nor consider ex parte or other communications concerning a pending proceeding." It is our position that no legal authorization has been

given to the judges of this State to hear ex parte requests for appointment of counsel. Certainly Penal Code section 987.9, which deals with confidential requests for investigative funds, provides no express authority to secretly request funds for the appointment of co-counsel. Stated simply, the public had a right to know that petitioner was requesting funds for two attorneys to act as his legal representatives. And, it also had the right to know what the respondent court's ruling was on the matter. 3/

The Colorado Supreme Court has recognized that serious questions of constitutional law involving freedom of the press and separation of governmental powers are raised by legislation denying the public access to judicial records. Times-Call Publishing Co. v. Wingfield (1966) 159 Colo. 172, 410 P.2d 511, 513. Here, the same questions arise by virtue of this Court's interpretation of Penal Code section 987.9, permitting secret requests for appointments of counsel, with no opportunity for public response or access to the record which is created. When

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3/ Real party in interest notes that this Court's opinion purports to state the People's position in this case (Slip Opinion, at p. 12 fn. 12). This seems rather strange since until this time the People had taken no position in the case, owing to the fact that there was no notice given of its pendancy, and because of the absence of any prior opportunity to be heard. Further, it is sadly ironic that the Court points to the assisting function of the Attorney General's office in the pretrial review process (ibid.) when by virtue of the record in this case having been ordered sealed, the Attorney General has been denied the opportunity to assist the local prosecutor.

construing a legislative enactment, however, it is the duty of the courts to "adopt an interpretation that, consistent with statutory language and purpose, eliminates doubts as to the provision's constitutionality." People v. Davis, supra, 29 Cal.3d at 829; In re Kay (1970) 1 Cal.3d 930, 942. Legislation should thus be construed, where reasonably possible, so as to preserve its constitutionality. Department of Corrections v. Workers' Comp. App. Bd. (1979) 23 Cal.3d 197, 207; California Housing Finance Agency v. Elliott (1976) 17 Cal.3d 575, 594. The courts must be especially sensitive to assure that constitutionally protected freedoms of speech and the press are preserved. As both the United States Supreme Court and this Court have observed in the context of ex parte temporary restraining orders, issued without notice to the opposing party, "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and give them an opportunity to participate." Carroll v. Princess Anne (1968) 393 U.S. 175, 180; Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal.3d 294, 311. Although prior restraints on presumptively protected First Amendment freedoms are not unconstitutional per se, in order to avoid constitutional infirmity such restraints must occur "under procedural safeguards designed to obviate the dangers of a censorship system." Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 559;

People ex rel. Busch v. Projection Room Theater (1976) 17 Cal.3d 42, 57.

The Court's opinion in this case, however, fails to consider, much less resolve, the constitutional problems inherent in allowing the courts of this State to appropriate funds to employ counsel in death penalty cases by means of "confidential," ex parte proceedings. Obviously, the prosecutor might never learn of counsel's requested appointment because he has never been given formal notice. Just as clearly, the public and the press would never be alerted because the Court's decision is reached in secret. Lest magisterial secrecy be allowed to sweep away the government of laws (see People v. Beasley (1970) 5 Cal.App.3d 617, 637), this Court must require public disclosure of any defense requests for funds to pay co-counsel, public disclosure of the superior court's ruling thereon, and public disclosure of co-counsel's identity. This Court cites no authority beyond its interpretation of Penal Code section 987.9 for the proposition that the public may be denied access to any hearing involving the appointment of counsel and the resultant prior restraint on the public's First Amendment rights.[4/]

4/ Government Code section 6200 would seem, on its face, to forbid the secreting of any judicial record. This statute provides in pertinent part that "'Every officer having the custody of . . . any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of . . . wilfully destroying, mutilating, defacing, altering or falsi-

By virtue of this Court's construction of Penal Code section 987.9, real party in interest submits that a statutory classification has been created, allowing death penalty defendants to secretly move for funds to pay co-counsel. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate those interests." Zablocki v. Redhail (1978) 434 U.S. 374, 388. The public unquestionably has a right, which we submit to be a fundamental one, to know about and discuss all judicial proceedings, unless there are articulated, substantial and legitimate reasons for denying the public's right of access. Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555, 591; see In re Shortridge, supra, 99 Cal. at 531. Dating from before the time reliable historical records were kept, the public has always been entitled to the right of access to criminal proceedings. Richmond Newspapers, Inc. v. Virginia, supra, 448 U.S. at 564-565. "Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are

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(Footnote 4/ continued)

fying, removing or secreting the whole or any part of such record, . . . paper, or proceeding, or who permits any other person to do so,' is punishable by a prison term of up to 14 years." Loder v. Municipal Court (1976) 17 Cal.3d 859, 863 (emphasis added).

conducted; . . . ." Id. at 575. The explicit, guaranteed rights to speak and to publish concerning what takes place at a criminal trial would be rendered meaningless if access to observe trial proceedings were, as here, arbitrarily foreclosed. Id. at 576-577. Absent an overriding interest on a part of a criminal defendant in protecting the right to a fair trial, the public is presumptively entitled to that right of access. Id. at 581. We submit that no compelling state interest even remotely justifies keeping the fact of counsel's request for funds to employ co-counsel a secret. "The fact that a lawyer is appearing in a representative capacity must always be out in the open." Wise, Legal Ethics (1970) at p. 334.

The Legislature has selectively limited those court proceedings to which the public is denied access. E.g., Cal. Pen. Code § 868; Cal. Welf. & Inst. Code § 676; see also, San Jose Mercury News v. Municipal Court (Garza) (1982) 30 Cal.3d 498. Even in those situations, however, the People, as the party litigant, have not been excluded from the proceedings as was the case here. To reiterate, we submit that there is nothing to balance against the public's right to know that money for a second attorney is being sought from the judiciary. No conceivable, legitimate reason for keeping either the fact of this request or the superior court's ruling on the matter a secret has been shown. Because Penal Code section 987.9, as construed by the opinion of this Court, serves to bar the public as well

as the People's legal representatives from such judicial proceedings, real party in interest maintains that its constitutionally protected rights have been infringed.

II

PENAL CODE SECTION 987.9 DOES NOT AUTHORIZE PAYMENT FOR COUNSEL IN DEATH PENALTY CASES.

Penal Code section 987.9 permits confidential applications in death penalty cases for funds to employ "experts, investigators and others . . . ." This Court now holds that this statute authorizes confidential requests for funds to pay for a second defense counsel. This reading of section 987.9 cannot withstand scrutiny.

What is now Penal Code section 987.9 appears in the 1977 Statutes of the California Legislature at Chapter 1048. This statute was first introduced into the Assembly by Assemblyman Goggin on March 15, 1977, as Assembly Bill 938.[5/] The bill originally amended sections 859b and 861 of the Penal Code, while adding new section 991 to the Penal Code (Exhibit A; Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Assembly, March 15, 1977, at p. 927).

On May 9, 1977, Assemblyman Goggin presented certain amendments which were read and adopted. Reference to sections 859b and 861 of the Penal Code were stricken and in their place was added a reference to "Article 13

5/ For the convenience of the Court, we have appended hereto, as Exhibit A, copies of Assembly Bill No. 938 and its amendments through the legislative process. We request judicial notice be taken of this bill. Cal. Evid. Code §§ 452; 459.

(commencing with Section 6191), to Chapter 4 of Division 3 of the Business and Professions Code, and amending section 987 of, and adding section 987.9 to, the Penal Code, relating to attorneys, and making an appropriation therefor" (Exhibit A; Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Assembly on May 9, 1977, at p. 2854). As amended, this bill expressly provided under section 987(a) for the assignment of counsel in capital cases; required the State Bar to prepare a list of qualified criminal defense attorneys to serve in capital cases; limited superior court appointments of counsel in such cases to those appearing on the State Bar list; provided for payment of investigators, experts and others under section 987.9; and appropriated $1,100,000 from the General Fund for these purposes (ibid.).

On May 19, 1977, the bill was further amended in the Assembly when the provisions dealing with the appointment of counsel and adding section 6191 to the Business and Professions Code were deleted. Provision for the appointment of counsel in death penalty cases was accordingly dropped from the bill, leaving only the provision for investigation funds. The amount of money appropriated from the General Fund was reduced by $100,000, thereby authorizing a sum of $1,000,000. The Legislative Counsel's Digest for this amended version of Assembly Bill No. 938, reads as follows:

"Existing law provides for the assign-

ment of counsel in capital cases and for the employment of counsel at public expense if the defendant is unable to employ counsel.

"This bill would provide for payment of investigators, experts and others for the preparation or presentation of the defense of indigent defendants in capital cases." (Exhibit A.)

Thereafter, Assembly Bill No. 938 was described in the Assembly Journal as "[a]n act to add Section 987.9 to, the Penal Code, relating to investigation funds, and making an appropriation therefor." (Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Assembly on June 9, 1977, at p. 4698; id. on June 10, 1977, at p. 4813; id. on September 8, 1977, at p. 9196; id. on September 9, 1977, at pp. 9213-9214; id. on September 12, 1977, at p. 9421.)

Assembly Bill No. 938 was amended in the Senate on August 11, 1977,[6/] to make it an urgency measure taking effect only if that year's Death Penalty Law (Senate Bill 155) was enacted. The confidentiality aspects of defense applications for funds to pay investigators, experts and others were added at that time, as was the requirement that the ruling on the defense request be made in an in-camera hearing by an anonymous judge other than the trial

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6/ The principal co-author in the Senate was Senator Deukmejian. Assemblyman Wornum's name was added to that of Assemblyman Goggin's as the bill's introducer.

judge. In other words, the confidential nature of defense requests was added to Assembly Bill No. 938 only after the bill's provision for counsel in death penalty cases had been deleted.

On September 8, 1977, the bill, as amended, was passed by the Senate on motion of Senator Deukmejian (Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Senate on September 8, 1977, at pp. 6565, 6574). As was true in the Assembly after provisions for appointing counsel were dropped from the bill, Assembly Bill No. 938 was consistently referred to in the Senate as an act "relating to investigation funds, . . ." (Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Senate on June 10, 1977, at p. 3317; id. on August 11, 1977, at p. 5029; id. on September 2, 1977, at p. 6143).

Assembly Bill No. 938, as amended, was passed by the Senate on September 8, 1977 (Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Senate on September 8, 1977, at p. 6574). The following day, September 9, 1977, the bill was passed by the Assembly, with that body's acceptance of the Senate's amendments (Assem. Bill No. 938 (1977-1978 Reg. Sess.) Journal of the Assembly on September 9, 1977, at pp. 9212-9213). The Governor signed it into law on September 24, 1977.

This history of Assembly Bill No. 938 leaves no room for doubt concerning the Legislature's intent in 1977, when it enacted what is now Penal Code section 987.9 into

law. A new provision for appointment of counsel in death penalty cases was, in no uncertain terms, rejected by the Legislature. As the Legislative Counsel's Digest states, existing law provided for counsel's appointment in death penalty cases. Assembly Bill No. 938, as amended, had nothing to do with either appointment or payment of counsel in such cases, but rather related specifically to the appropriation of funds to pay for investigative services. There is nothing equivocal about the Legislature's distinction between the provisions for appointing counsel on the one hand, and providing funds for investigation on the other. The history of this statute clearly reveals a specific and limited legislative intent, unrelated to any desire to provide for assignment of counsel in death penalty cases. Since the Legislature explicitly rejected any provision for appointing counsel in such cases, and made not the slightest suggestion that it intended the payment of counsel under section 987.9, this Court should not have inserted counsel into that statute.

"As stated in Madrid v. Justice Court (1975) 52 Cal.App.3d 819, 825: '"The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision."'" California Costal Com. v. Quanta Investment

Corp. (1980) 113 Cal.App.3d 579, 601-602.

Clearly, the Legislature enacted Penal Code section 987.9 not as a means of providing funds to pay for additional counsel in death penalty cases, but solely as a method to provide funds for investigation services. 7/ Cf. People v. Davis (1981) 29 Cal.3d 814, 829-830. The conclusion that section 987.9 was not intended to apply to funds for counsel is further buttressed by a brief examination of the other subsections of Penal Code section

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7/ People v. Jackson (1980) 28 Cal.3d 204, 287, provides no support for this Court's conclusion that Penal Code section 987.9 empowered the respondent superior court to secretly appropriate funds for a second defense attorney. In holding that equal protection principles did not mandate the appointment of two attorneys in death penalty cases, Jackson stated:

> "Accordingly, equal protection demands are satisfied by permitting the trial court, in its discretion, to appoint additional counsel at public expense if the circumstances in a particular case appear to require such an appointment. (See § 987.9, authorizing payment for 'investigators, experts and others for the preparation or presentation of the defense.')"

The "See" citation to section 987.9 can hardly be said to constitute an authoritative discussion on the question of whether that section applies to funds for co-counsel's appointment. "Incidental statements or conclusions not necessary to the decision are not to be regarded as authority." Simmons v. Superior Court (1959) 52 Cal.2d 373, 378. "It is axiomatic that judicial statements of law on points not 'raised or considered' or 'disputed or argued' lack precedential or authoritative value. 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 699, p. 4615.)" Malone v. Western Conf. of Teamsters Pension Trust (1980) 110 Cal. App.3d 538, 549.

Jackson, therefore, is but little help on the matter decided here, since section 987.9 was cited without discussion or apparent argument.

987, which expressly provide for payment of counsel. Pursuant to section 987.2(a), court-appointed counsel in all cases (with an exception under section 987.2(c) for those public defenders representing inmates of the Department of Corrections), are paid out of the county general fund. Section 987.6 provides State reimbursement to counties, in an amount not exceeding 10 percent, for funds expended by the counties in providing counsel for persons charged with violating State criminal law. This Court's opinion, however, would now require the State to pay for all the expenses of co-counsel from the funds, which the Legislature has appropriated for investigators, experts and others. Since State payment for costs of counsel, in an amount not to exceed 10 percent, was already covered by existing law, one could not reasonably assume that the Legislature was knowingly undertaking the State's full payment of co-counsel in all death penalty cases. A matter of this fiscal magnitude could not merely have been overlooked by the Legislature.

Since the legislation authorizing trial court funding of investigations and experts mandates a higher level of service on local government, the Legislature was required to provide funding to reimburse those costs. Section 2231, Revenue and Taxation Code. The Legislature did so by appropriating $1,000,000 as part of Assembly Bill No. 938 and has continued to fund these services by providing an annual appropriation of $1,000,000 in later

budget years. California Stats. 1979, Chapter 259, Budget Act Item 415, California Stats. 1980, Chapter 510, Budget Act Item 467. As of July 1, 1981, the State has disbursed a total of about $2,630,000. The amounts appropriated make it clear that the Legislature intended 987.9 to apply only to investigation expert costs, rather than to include costs of a second appointed counsel. A quick check of costs for appointed defense trial counsel reveals that a conservative estimate of the average cost would be in excess of $25,000.[8/] Los Angeles County alone has prosecuted more than 150 capital cases since restoration of capital punishment in California. That cost alone would exceed $4,000,000. If the Legislature had intended to include the appointment of additional counsel within 987.9, the appropriations would have been increased by several million dollars.

Even assuming, however, that the Legislature had not rejected a provision for appointing counsel in death penalty cases when it enacted Penal Code section 987.9, ordinary rules of statutory construction would forbid this Court's inclusion of second counsel within the language of that statute. Surely, a defense counsel cannot be deemed to be an expert or an investigator. All that then remains is the pronoun "others." But,

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8/ For example, the cost of appointed defense trial counsel in several cases before this Court is as follows: People v. Harris, Crim. No. 20888 - $43,957; People v. Bittaker, Crim. No. 21942 - $41,800; People v. Hamilton, Crim. No. 21958 - $86, 903; People v. Kimble, Crim. No. 21962 - $22,400; People v. Myers, Crim. No. 21991 - $32,600.

"As stated in People v. McKean (1925) 76 Cal. App. 114, 119: '"By the rule of construction known as 'ejusdem generis,' where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. The particular words are presumed to describe certain species, and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes. The word 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind or character."' (Second italics added.)" California Coastal Com. v. Quanta Investment Corp., 113 Cal.App.3d, supra, at 607; see Pasadena University v. Los Angeles Co. (1923) 190 Cal. 786, 790; Scally v. Pacific Gas & Electric Co. (1972) 23 Cal.App.2d 806, 819.

Within common understanding, co-counsel is not

of the same general class or category as experts and investigators. Had the Legislature intended the word "others" to include counsel, it would have been easy to say so. The failure of the Legislature to accomplish with precision the very result urged by petitioner and adopted by this Court demonstrates the fundamental weakness of that position. People v. Caudillo (1978) 21 Cal.3d 562, 586. While words may be elastic and capable of being stretched to fit a desired meaning, making counsel into an "other" exceeds the bounds of reasoned interpretation. Words within a legislative enactment should not be interpreted so as to "carry the operation of the enactment far beyond the legislative intent and thereby make its provisions apply to transactions never contemplated by the legislative body . . . ." Bruce v. Gregory (1967) 65 Cal.2d 666, 674; People v. Davenport (1939) 13 Cal.2d 681, 695. It denigrates the role which defense counsel plays in our criminal justice system to label co-counsel as an "other" in order to bring that attorney within the language of Penal Code section 987.9.

Moreover, this Court should consider the practical consequences of permitting secret requests for funds with which to employ co-counsel. Unlike other statutes such as Penal Code sections 859b and 987.2, which empower a trial court to appoint counsel, section 987.9 gives the assigned superior court judge no power to select, much less even to reject, whichever "experts, investigators or others . . . ."

the defense attorney chooses. By the provisions of this statute, the court is only authorized to appropriate funds to pay for those persons' services. Does this Court's opinion now portend the secret appointment of defense counsel in capital cases, absent the trial court having any choice in the matter? If so, we submit it is inviting cronyism or defense counsel's selection of incompetent co-counsel. It is, we submit, manifest that section 987.9, with its provision for confidential applications to an anonymous judge other than the trial judge, was never intended by the Legislature to apply to appointments of counsel, which by law are the statutory duties of the magistrate on arraignment in open court (Pen. Code §§ 859, 987), or within the inherent jurisdiction of the trial court.

In summary, real party in interest believes that this Court erred when it decided that Penal Code section 987.9 applies to the appointment of defense counsel in capital cases. As matters of legislative history, statutory construction, and practical application, the conclusion that this statute authorizes the confidential payment of funds for a second attorney is plainly wrong.

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III

THE SUPREME COURT, COURT OF APPEALS AND SUPERIOR COURT ACTED IN EXCESS OF THEIR JURISDICTION WHEN THEY HEARD PETITIONER'S EX PARTE APPLICATIONS FOR FUNDS TO EMPLOY CO-COUNSEL.

As has been shown, Penal Code section 987.9, as well as independent constitutional guarantees, do not permit ex parte proceedings on the appointment of counsel. Because that statute is inapplicable to counsel's appointment, we contend that respondent superior court acted in excess of its jurisdiction when it heard petitioner's secret application.

In Safer v. Superior Court (1975) 15 Cal.3d 230, this Court considered the propriety of the Ventura County District Attorney's intervention into a civil suit. The prosecutor there attempted to charge certain persons with contempt of court under Code of Civil Procedure, section 1209, rather than as misdemeanors under Penal Code section 166, subdivision 4. Id. at 233-234. The latter statute afforded the alleged contemnors the right to a jury trial, while the former did not. Id. at 234; 239. After examining several specific statutes under which the district attorney could have properly exercised the power of his office (id. at 236-238), this Court concluded that the Legislature had not authorized the district attorney to appear in private contempt proceedings. Id. at 238. The Court found it significant that when the Legislature granted the district attorney the power to appear in civil

proceedings, that power was specifically delegated. Absent any such specific authority, the district attorney was not authorized to intervene and the proceedings could be restrained by a writ of prohibition. Thus, this Court stated:

> "We find further indication that the district attorney's authority does not embrace the circumstances of this case in the Legislature's clear demonstration that it knows how to grant him such power when it wishes to do so. . . . Thus the Legislature, when it desired to authorize a district attorney's intervention in contempt proceedings stemming from private litigation to enforce an order, had no difficulty in expressing itself; its articulation of specific statutory authorization in that situation points to the absence of such authority in the instant case." Id. at 237-238.

Here, of course, there exists a similar absence of any specific statutory authority permitting counsel in a death penalty case to move ex parte for the appropriation of funds to employ a second attorney. The Legislature, when it desired to give death penalty defendants the right to appointment of counsel, had no difficulty expressing itself. Pen. Code §§ 859b, 987.2. Hearings

under the latter two Penal Code sections would occur in open court where both the public and their legal representatives would have knowledge of the requested appointment of co-counsel.

Instead of proceeding under these specific provisions of the Penal Code, petitioner moved pursuant to section 987.9, which allows confidential applications for funds to employ investigators, experts and others, thereby depriving the People of their due process rights to notice and an opportunity to be heard, and their First Amendment rights of free access to court proceedings. As in Safer, we submit that the respondent superior court acted in excess of its jurisdiction, in the broad sense of this word, when it heard petitioner's ex parte applications. "'It seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction.'" Id. at 242.

In the present case, the Superior Court in and for the City and County of San Francisco, by permitting petitioner's defense counsel to seek funds for appointing co-counsel under Penal Code section 987.9, contrary to the statutorily authorized procedures for such appointments, failed regularly to conduct its proceedings. In so doing, respondent superior court exceeded its jurisdiction. Ibid. Had real party in interest been advised of respondent

superior court's unauthorized hearing of petitioner's motion, we would have moved to prohibit such unlawful proceedings. But, since respondent court correctly denied the petition, though not for this reason, its determination must be sustained. Respondent superior court lacked legal authorization covertly to appropriate funds for co-counsel under Penal Code section 987.9, and both this Court and the Court of Appeals similarly lack jurisdiction to order the secret payment of State funds for a second court-appointed attorney. The Legislature has not authorized the courts to hold the kind of covert hearings which have occurred in this case.

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IV

DUE PROCESS OF LAW DOES NOT REQUIRE THE APPOINTMENT OF TWO ATTORNEYS TO REPRESENT PETITIONER.

This court has previously held that:

"A defendant's right to court appointed counsel does not include the right to require the court to appoint more than one counsel, unless the record clearly shows that the first appointed counsel is not adequately representing him." In re Banks (1971) 4 Cal.3d 337, 342; People v. Williams (1970) 2 Cal.3d 894, 904; see People v. Smith (1968) 69 Cal.2d 751, 758-759.

Federal law is in accord. The federal appellate courts have recognized that there is no fundamental constitutional right to representation by more than one attorney in death penalty cases. United States v. Blankenship (4th Cir. 1976) 548 F.2d 1118, 1121, cert. den. 425 U.S. 978; United States v. Williams (4th Cir. 1976) 544 F.2d 1215, 1218; Crum v. Hunter (10th Cir. 1945) 151 F.2d 359, 361, cert. den. 328 U.S. 850 (1946). Rather, such right has been granted by statute. 18 U.S.C. § 3005. This statutory command has been held to supercede the district court's normal exercise of discretion in determining whether one appointed attorney will or can adequately and effectively represent the accused. United States v.

Blankenship, supra, 548 F.2d at 1121.

Nevertheless, this Court now creates a presumption that in cases of "genuine need" a second attorney is required in death penalty cases. The foundation for erecting this presumption is the Legislature's intent when it enacted section 987.9 to provide "a complete and full defense" in a capital case. The problem with this judicially created presumption, however, lies in its uncritical reliance on section 987.9 as a basis for appropriating funds to pay for co-counsel. Lacking the foundation provided by section 987.9, the presumption lacks any precedential support and must, like a house built on quicksand, fall. As we have shown, it is inconceivable that the Legislature ever intended section 987.9 to apply to assignment of, or payment for, counsel. This Court's presumption, therefore, cannot withstand the test of critical analysis.

If any presumption exists, it is that attorneys licensed by the State Bar are, as a matter of law, presumed competent to appear in all types of actions, including death penalty cases. In Smith v. Superior Court (1968) 68 Cal.2d 547, this Court considered the question whether a trial judge is empowered to remove a court-appointed attorney when the court believes that the attorney is incompetent because of ignorance of the law to try a particular case. In that instance, it was a death penalty case. The Court, per Justice Mosk, concluded that the

trial judge lacked such power, observing that "the admission of an attorney to the bar establishes that the State deems him competent to undertake the practice of law before all our courts, in all types of actions." Id. at 559. It should, accordingly, be presumed in this case that Mr. Schwartzbach, alone, is competent to represent petitioner.

Heretofore, the decision as to whether the court should appoint more than one counsel has been vested in the sound discretion of the trial courts. People v. Jackson, supra, 28 Cal.3d at 286-287. In the analogous circumstance of appointing substitute counsel, this Court has declared that there is a "field of discretion for the [trial] court." People v. Marsden (1970) 2 Cal.3d 118, 123. A "heavy burden" had been imposed in order to state a claimful relief cognizable on mandate. Drumgo v. Superior Court (1973) 8 Cal.3d 930, 933. Standards for that discretionary decision have been enunciated:

> "'The word [discretion] imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped

by prejudice nor moved by any kind of influence save alone the overwhelming passion to that which is just.'"

People v. Russel (1968) 69 Cal.2d 187, 194.

For all practical purposes, as a result of this Court's opinion in this case, the matter of appointing counsel in death penalty cases has been removed from the courts' discretion. Discretion now resides with defense counsel, such that any death penalty defendant's lawyer who wants a second lawyer's assistance will inevitably be able to get one under this Court's present ruling.

Still, one searches in vain for the source of this right. Neither constitutionally nor by statute have criminal defendants been granted the right to have more than one appointed attorney. The California Constitution, under article I, section 15, affords all criminal defendants the right "to have the assistance of counsel for [their] defense, ..." Penal Code section 686, which implements this constitutional guarantee, entitles a defendant in a capital case to "appear and defend in person and with counsel . . . at all stages of the preliminary and trial proceedings." Pursuant to Penal Code sections 859 and 987(b), in a capital case the defendant "must be represented by counsel. . . ." None of these provisions contain the slightest clue that a defendant in a capital case is entitled to have more than one attorney act as a legal representative. If funds for co-counsel are presumptively

to be appropriated in death penalty cases, then we believe the presumption to be a matter for the Legislature and not the courts to implement. See People v. Collie (1981) 30 Cal.3d 43, 56.

Due process of law, as we comprehend it, does not necessarily require representation by more than one attorney. The substance of due process may be denied even though the accused is represented by a coterie of counsel, yet the accused may have it when he is represented by a competent attorney. Unless present counsel's representation is held to be constitutionally inadequate, there is no justification for the appointment of additional counsel in this case.

Lacking from the beginning any opportunity to participate in these proceedings, and without access to the record in this case, which has been ordered sealed, the People are necessarily at a disadvantage in responding to the Court's reasons for concluding that second counsel is required here. Had we been given the chance to be heard before the courts, however, it would have been our position that this case is neither more factually nor legally complex than the run-of-the-mill robbery which results in a murder. As described in another context, it is a rather "'ordinary' homicide such as all too often occurs in the course of a robbery. . . ." Frazier v. Superior Court (1971) 5 Cal.3d 287, 295. Furthermore, we would have disputed the need to have a lawyer interview

each of the alleged 120 witnesses, which we suspect is an exaggerated figure in any event. Counsel has been given investigative services and should not be expected to waste both time and money by personally interviewing every person who has ever had any connection with his client, no matter how remote that connection. "Extraordinary preparation" is what is expected of any defense counsel, and should not be an excuse for seeking two lawyers. Keenan's other criminal misdeeds, moreover, involve in at least four cases, alleged crimes of escape, attempted escape and assault on an inmate with a prison-made weapon, all of which occurred after the charged homicide. He should not be rewarded because he has made his case more complicated by committing more crimes. Finally, we would have argued that even under this Court's newly created standard of "genuine need," the fact that present counsel would find a second attorney's assistance "useful" in preparing pretrial writs, does not establish the need for such assistance. Petitioner can hardly complain of any loss because of an inability to have the appellate courts hear his pretrial writs, where he has filed, to our knowledge, at least seven such petitions resulting in the delay of his trial for over two and one-half years. In all these respects, real party in interest would have contended that two attorneys are not necessary in this case.

Real party in interest submits that the decision whether two, or more, attorneys are required for effective

assistance in a given case should remain subject to the trial court's sound discretion. Nothing magic inheres in the number two. It could be argued that three attorneys would be better than two, not only for their superior brain power, but also because any conflicts among them could be settled by majority vote. Nor do we believe that having two, or three, or even four lawyers present will deter the tide of incompetence of counsel claims. The contrary seems just as likely to occur as each attorney tries to shift the blame of the loss on the other, and the accused seeks to play both ends against the middle. We can envision the addition of more defense lawyers becoming like more rocks thrown into a pond to muddy the waters.

This Court's opinion fails to address the question of its retroactive effect. Because the opinion refers to the respondent superior court's past error in failing to apply the newly created presumption when a showing of "genuine need" is satisfied, it undoubtedly will be argued that the Court's ruling is to be given retroactive effect. In that event, we can anticipate claims in death penalty cases which are pending on appeal, and in the trial courts, of a presumed need for two attorneys. On the other hand, the Court has created a new rule of law which should not apply to cases already final or in the process of appellate litigation. The matter of retroactivity, too, must be addressed.

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CONCLUSION

This Court's opinion expressly recognizes that Keenan has no absolute right to representation by more than one attorney (Slip Opinion, at p. 6). What we do challenge are petitioner's need for two lawyers in the circumstances of this case; the propriety of covert appropriations of funds to pay for a second lawyer; the compelling State interest which justifies denial of the People's rights to be heard and to have access to judicial proceedings; and the express authorization by the Legislature to hold ex parte hearings on matters relating to the appointment of counsel. We question the authority of the respondent superior court to appropriate funds to pay for a second lawyer in advance of that attorney having rendered any services, when section 987.3 of the Penal Code requires the trial court to award a reasonable fee based, in part, on the "time and labor required to be spent by the attorney." Pen. Code § 987.3(b). The accounting system would, under this Court's ruling, be backwards, for counsel would now be given a lump sum to go out and hire a second lawyer, absent any public knowledge of the amounts so advanced or counsel's selection for the job. Suppose counsel wanted to hire his unemployed brother-in-law, or worse yet the judge's brother-in-law? Suppose all of the funds were not spent, would the State under this Court's decision now be obliged to sue in order to retrieve the

money? These are among the perplexing questions raised by this Court's opinion based on its interpretation that Penal Code section 987.9 authorizes the secret appropriation of funds to pay for a lawyer. We contend the Legislature could not possibly have contemplated these consequences when it granted a capitally charged defendant the right to seek, in confidence, funds for investigative or expert services. Because the People have been denied their rights by virtue of this Court's construction of Penal Code section 987.9, we respectfully ask this Court to reconsider its initial ruling and grant this Petition for Rehearing.

For the foregoing reasons, the People, as real party in interest, submit that rehearing should be granted and the matter remanded to the trial court, in order for it to exercise its jurisdiction and discretion in the first instance by holding a public hearing on petitioner's motion for a second court-appointed attorney, at which hearing the People will be entitled to notice and an opportunity to be heard.

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DATED: February 23, 1982

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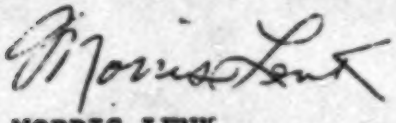

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